

**UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY**

**BEFORE THE ADMINISTRATOR**

<b>IN THE MATTER OF:</b>	)	
	)	
<b>MINNESOTA METAL FINISHING, INC.,</b>	)	<b>Docket No. RCRA-05-2005-0013</b>
	)	
<b>Respondent</b>	)	

**ORDER ON MOTION FOR LEAVE TO AMEND COMPLAINT**

**I. Background**

This action was initiated on August 26, 2005, by the filing of a five count Administrative Complaint charging Respondent Minnesota Metal Finishing, Inc., with violating the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. §§ 6901 *et seq.* and certain Federal and state regulations promulgated to implement RCRA, codified as 40 C.F.R. Parts 260 through 279, and Minn. R. 7045.0292 and 7045.0450 through 7045.0551. The Complaint asserts that Respondent owns and operates a facility in Minneapolis, Minnesota which generates, treats, stores and disposes of hazardous waste. In regard thereto, the Complaint alleges, in brief, that Respondent failed to: (1) adequately train certain of its employees, as well as maintain records of such training, employee job titles, and job descriptions, in violation of Minn. R. 7045.0454, Subparts 1, 2, 3, 5, 6.A-6.C (40 C.F.R. §§ 264.16(a)(1)-(3), (b), (c), (d)(1)-(d)(3)) (Count 1); (2) include in its facility's Contingency Plan at all required times an evacuation plan, a named Primary Emergency Coordinator, identification of emergency equipment capability, and obtain the agreement to such Plan from local emergency response officials, in violation of Minn. R. 7045.0466, Subpart 4.C-F (40 C.F.R. §§ 264.52(c)-(f)) (Count 2); (3) maintain and operate its facility to minimize the possibility of fire, explosion, or any unplanned release of hazardous waste, in violation of Minn. R. 7045.0462, Subparts 1.G and 2 (40 C.F.R. §§ 262.34(a)(4) and 264.31) (Count 3); (4) provide its employees with immediate access to an internal alarm or emergency communication device, in violation of Minn. R. 7045.0462, Subparts 3B and 5 (40 C.F.R. §§ 264.32(b) and 264.34(a) (Count 4); and (5) obtain a permit from Federal or state authorities for the storage of hazardous waste, in violation of Minn. R. 7001.0030 and 7001.0520, Subpart a.A (Count 5). The Complaint proposes an aggregate civil penalty for the violations of \$300,000 and requests issuance of a Compliance Order. Respondent filed an Answer to the Complaint October 4, 2005 wherein it raised six affirmative defenses.

By Motion dated January 31, 2006, Complainant requested leave to amend its Complaint in order to "revise the allegations of Count 1, and amend the penalty demands, and the outline of the penalty calculation for all of the Counts . . . " ("Motion"). Complainant attached a copy of its Proposed (unsigned) Amended Complaint and Compliance Order to its Motion. Respondent

filed a Memorandum of Law in Opposition to Complainant's Motion for Leave to Amend Complaint on or about February 14, 2006, challenging the proposed additional and revised allegations on the grounds that they are stale or barred by the statute of limitations, barred by RCRA Section 3008(a)(2) (42 U.S.C. § 6928(a)(2)), and/or the justification therefore is "dubious" ("Opp.") On February 21, 2006, Complainant filed a Reply Memorandum in support of its Motion ("Reply).

## **II. Standard for Motion to Amend Complaint**

The Consolidated Rules of Practice provide that "the complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.13(c). No standard is provided in the Rules, however, for determining whether to grant an amendment. The Federal Rules of Civil Procedure (FRCP) offer instructive guidance to motions to amend in administrative proceedings. *Port of Oakland and Great Lakes Dredge and Dock Co.*, 4 E.A.D. 170, 205 (EAB 1992). The general rule is that administrative pleadings are "liberally construed and easily amended." *Port of Oakland and Great Lakes Dredge and Dock Company*, 4 E.A.D. 170, 205 (EAB 1992)(quoting *Yaffe Iron & Metal Co., Inc. v. U.S. EPA*, 774 F.2d 1008, 1012 (10<sup>th</sup> Cir. 1985)). The standard in Federal court for amendment of pleadings is set forth in *Foman v. Davis*, 371 U.S. 178, 181-82 (1962) as follows: "[i]n the absence of . . . undue delay, bad faith or dilatory motive on the part of the movant . . . undue prejudice to the opposing party . . . [or] futility of amendment," leave to amend pleadings should be allowed.

## **III. Discussion**

Complainant states in its Motion that its proposed amended Complaint does the following: (a) deletes allegations regarding Respondent's failure to have a training program directed by a person trained in Hazardous Waste Management procedures on the basis that information the Complainant obtained after the filing the Complaint from County officials evidences that those allegations are unsupportable; (b) deletes allegations of failure to provide minimum training in order to "focus the hearing and Complainant's resources on those aspects of Respondent's training that were most clearly or importantly inadequate . . ."; (c) adds new allegations of failure to document training for which it had evidentiary support but "through oversight," failed to allege in the original Complaint; (d) revises the penalty calculation for all five Counts to increase some and decrease others "in order to maintain an overall penalty of \$300,000, which Complainant has determined that Respondent is able to pay," and in connection therewith deleting Attachment A to the original Complaint which set forth the penalty calculation; and (e) makes some miscellaneous editorial revisions to the Complaint. Motion 1-3; Memorandum in Support of Motion at 3-9. Complainant alleges in the Motion that "the above changes are for the good cause of fulfilling the interests of justice in alleging all violations for which there is significant evidence, and in focusing Complainant's enforcement action on Respondent's most significant violations; to make more accurate and specific, correct errors in, and add to the material fact allegations of Count 1; and to adjust Complainant's penalty demands

to more accurately reflect the seriousness of the violations charged and Respondent's good faith efforts to comply, and to reflect Respondent's financial ability to pay a penalty. Moreover, the amendments are made in good faith and without dilatory motive, do not prejudice the Respondent, and would not be futile." Motion at 2-3.

In its Opposition to the Motion, Respondent raises three arguments discussed herein.

#### A. Claims barred by statute of limitations

In its Opposition to the Motion, Respondent in part challenges the amendments to Count 1, alleging that they add violations and amend violations "that were allegedly committed 19 years before the period alleged in the Complaint" and thus are stale and/or barred by the statute of limitations. Respondent notes that the original Complaint (filed on August 26, 2005) alleged that Respondent failed to train its employees from "August 25, 2000, to August 25, 2005" (§ 120) but the proposed Amended Complaint alleges that Respondent failed to train its employees from "November 24, 1981, to August 25, 2005" (§ 106). The Amended Complaint also adds a violation that Respondent failed to have records for one of its employees from "November 24, 1981, to September 14, 2004" (§ 99 and 110). Respondent argues that justice is not served by allowing these stale violations to be added in that such allegations require Respondent to "expend significant amounts of additional time and expense to uncover and investigate the facts to support successful defenses that the 19 years of violations are precluded by the applicable statute of limitations, prior resolution by the State of Minnesota, or additional legal theories. . . ."

In Reply, Complainant states that the factual allegation regarding certain violations dating back to November 24, 1981 "represents the start [date] of Respondent's operations" and does "not represent an attempt to penalize Respondent for violations outside the statutory limitations period of five years prior to filing of the Complaint." Moreover, it notes that certain recordkeeping requirements require retention of records for only three years and thus, Complainant acknowledges that it could not as a matter of law claim a violation for failing to retain records for more than three years prior to its initial inspection of Respondent's facility in May 2001. Further, it states that the penalty calculations for the Amended Complaint reflect violations only from August 2000 to August 2005 as plead in the original Complaint.

The five year statute of limitations referred to by the parties, although not explicitly cited in their pleadings, is 28 U.S.C. § 2462, which provides as follows:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within **five years** from the date *when the claim first accrued* . . . .

28 U.S.C. § 2462 (emphasis added).

Administrative proceedings brought by the Federal government for the assessment of penalties have been held to be an “action, suit or proceeding for the enforcement of any civil fine [or] penalty” within the meaning of Section 2462. *3M Company v. Browner*, 17 F.3d 1453 (D.C. Cir. 1994).

In that Congress has not “otherwise provided” for any time limitations period on commencing enforcement actions under RCRA, Section 2462 is applicable here. This action was commenced on August 25, 2005. Therefore, regardless of what the parties may allege, Complainant is limited in its claims in this case to those that first accrued within five years of August 25, 2005, and any claim which first accrued before then, *i.e.* before August 25, 2000, is generally barred.

Thus, Complainant cannot by virtue of its proposed amended pleading effectively extend its claims back 19 years, nor can it thereby impose a burden on Respondent to conduct discovery in regard to violations extending back 19 years, as alleged by Respondent. Nor does Complainant allege that this is its intent. Rather, Complainant alleges that it used the date of “1981” to reflect essentially its assertion that “at no time during its operations” was Respondent in compliance with certain regulatory provisions, as compared to having once been in compliance and then, for whatever reason, ceasing to be. The use of this date may represent inartful pleading, but does not represent a substantive change in the extent of violations alleged in the original Complaint. Therefore, it is permissible.

#### B. Claims barred by notice provision of RCRA Section 3008(a)(2)

Respondent challenges the proposed amendments to the allegations contained in Counts 2, 3, and 5 as well as some of those contained in Count 1 of the Complaint on the basis that EPA failed to give prior notice of the violations to the State of Minnesota as required by RCRA Section 3008(a)(2) (42 U.S.C. § 6928(a)(2)). This argument was made in Respondent’s previously filed Motion for Accelerated Decision, which has been denied and thus these arguments are moot.

#### C. Penalty demands unsupported

Respondent challenges the proposed amendments reducing the proposed penalty for Count 1 by \$10,000, while increasing it by \$10,000 as to Count 3, to maintain the aggregate proposed penalty of \$300,000 on the basis that this is a penalty “which Complainant has determined Respondent has the ability to pay,” suggesting that the explanations given for the recalculation of the proposed penalty “are dubious” and “concoct[ed].”

The Consolidated Rules of Practice provide that the Complainant bears the burden of proof regarding the appropriateness of the penalty. *See*, 40 C.F.R. § 22.24. In calculating its *proposed* penalty, the Agency is generally obliged to follow any applicable penalty policy it has

issued, such as the Revised RCRA Civil Penalty Policy issued in June 2003.

However, this Tribunal is *not* bound by such proposed penalty amount or the policies it is based upon in reaching its *final* penalty determination. *B&R Oil Co.*, 8 E.A.D. 39, 51 (EAB 1998)(a presiding officer is not required to strictly follow Agency penalty policies and can depart from a penalty policy as long as he or she adequately explains the reasons for doing so). *See, also, Everwood Treatment Co.*, 6 E.A.D. 589, 600 (EAB 1996); *DIC Americas, Inc.*, 6 E.A.D. 184, 190 and n.10 (EAB 1995); *Employers Insurance of Wausau*, 6 E.A.D. 735, 756 (EAB 1997).

Rather, in determining the penalty to be assessed in this case, this Tribunal is guided by the Consolidated Rules of Practice which provide in pertinent part that:

[i]f the Presiding Officer determines that a violation has occurred and the complaint seeks a civil penalty, the Presiding Officer shall determine the amount of the recommended civil penalty *based upon the evidence in the record and in accordance with any civil penalty criteria in the Act*. The Presiding Officer shall consider any civil penalty guidelines [or policy by EPA] issued under the Act.

40 C.F.R. § 22.27(b)(italics added).

With regard to assessing a civil penalty for violations of its provisions, RCRA § 3008(g) (42 U.S.C. § 6928(g)) provides:

(g) Civil penalty. Any person who violates any requirement of this subtitle shall be liable to the United States for a civil penalty in an amount not to exceed \$ 25,000 for each such violation. Each day of such violation shall, for purposes of this subsection, constitute a separate violation.

RCRA § 3008(a)(3) (42 U.S.C. § 6928(a)(3)) provides that “In assessing such a penalty, the Administrator [or his delegates] shall take into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.”

Therefore, the fact that the Complainant has modestly recalculated its proposed penalty in this case under its penalty policy with the intention and/or result of maintaining the same penalty initially proposed will not effect how the final penalty in this case will be determined. Evidence will be taken from both sides at the hearing in regard to the statutory penalty factors and each party will also be given a full opportunity at that point to challenge the opposing party’s calculations, during which time Respondent, if it still wishes, can show how Complainant’s penalty calculations are “dubious” or “concoct[ed].” However, at this point it is premature to issue any ruling regarding Complainant’s penalty calculations.

#### **IV. Conclusion**

In that there is no evidence that Complainant's proposed amendments will cause undue delay in this proceeding or undue prejudice to Respondent, or that they are motivated by bad faith or a dilatory motive, or that they are futile, the Motion to Amend will be granted.<sup>1</sup>

#### **V. ORDER**

1. Complainant's Motion For Leave Amend Complaint, dated January 31, 2006, is hereby **GRANTED**. Complainant shall file and serve on Respondent the Amended Complaint attached to the Motion, within seven days of the date of this Order.

2. Respondent shall file an answer to the Amended Complaint within twenty days of the date of service of the Amended Complaint.

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Susan L. Biro  
Chief Administrative Law Judge

Date: March 17, 2006  
Washington, D.C.

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<sup>1</sup> Respondent includes in its Opposition a request that it "be compensated for its expenses incurred in marshaling the facts to uncover not only the admitted 'oversights' and 'errors', but apparent misstatements" in Complainant's pleadings. Opp. At 3. The Consolidated Rules of Practice do not provide for such compensation, however the actions of the parties and/or their counsel during the litigation which fall below the requisite standard of appropriate conduct may be taken into account in establishing the appropriate penalty to be assessed. *See, C.W. Smith*, 2004 EPA ALJ LEXIS 128, 167-168 (EPA ALJ 2004) and cases cited therein.

I.